No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENN., *Respondent*

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN PUBLIC GAS ASSOCIATION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States, the American Public Gas Association, representing the interests of over 200 local public gas distribution systems located throughout the United States, all political subdivisions of their respective states, submits this Brief Amicus Curiae in support of the Respondent, the Natural Gas Utility District of Hawkins County, Tennessee, seeking affirmance of the decision of the United States

Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tennessee*, 427 F. 2d 312 (6th Cir., 1970). The Solicitor General on behalf of the Petitioner and attorneys for the Respondent have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The American Public Gas Association is a nonprofit organization representing more than 200 local public gas systems located in 28 States.[1] The Association consists primarily of municipal gas systems, but also includes public utility districts, county districts and other public agencies having gas facilities. In size the systems range from a few large cities to many small municipal systems serving a few hundred residents in a town or village. For the most part, public gas systems serve smaller communities where, but for the public system, there would be no natural gas service in the community. The 937 public gas systems serve approximately 7 percent of the total natural gas customers in the United States.

Through the Association these local public gas systems have a voice in national policies affecting their operations. Reversal of the decision of the United States Court of Appeals for the Sixth Circuit would disturb a national policy which vitally affects the operations of local public gas systems. A reversal would give license to government agencies to disregard the definitive statements of a state court regarding the nature of its political subdivisions and to determine the status of such subdivisions de novo, thereby placing in

[1] There are currently operating in the United States 937 public gas systems (American Public Gas Association 1969 Directory).

jeopardy numerous exemptions and preferences contained in federal statutes which are necessary for the optimum development and operation of these systems and which are dependent upon recognition of the status of such systems as political subdivisions, all to the prejudice and detriment of the Association's members.

ARGUMENT

I. Congress intended that determinations of whether an entity is a "political subdivision" of a state within the meaning of section 2(2) of the National Labor Relations Act should be made in accordance with the characterizations made by the highest court of a state unless unreasonable, discriminatory, or otherwise inconsistent with the broad purposes of the Act.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any state or political subdivision thereof". Although the term "political subdivision" is not defined in the Act and the legislative history is silent on the matter, this exemption from the Act's coverage, like similar exemptions in other social legislation of the period,[2] was obviously designed with paramount regard to the delicate policy questions involved in applying such legislation to state and local governmental entities. This Court has made it clear in various contexts that "how power shall be distributed by a state among its governmental organs is commonly, if not always, a

[2] E.g., the Public Utility Holding Company Act of 1935 exempts "the United States, a State, or any political subdivision of a State" from the regulatory authority of the Securities and Exchange Commission and the Federal Power Commission, 15 U.S.C. § 79b, 16 U.S.C. § 824; the Fair Labor Standards Act of 1938 exempts "the United States or any State or political subdivision of a State", 29 U.S.C. § 203(d); the Social Security Act excludes "service performed in the employ of a State, or any political subdivision thereof", 26 U.S.C. § 3121(b)(7).

question for the state itself." *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937). Consequently it is reasonable to assume that Congress was aware that such questions were peculiarly a matter for state law to which deference would be paid in interpreting the section. It would be unreasonable to conclude that Congress intended the question of an entity's status to be decided *de novo* where the highest court of a state had already addressed itself to the matter.

The Board erroneously poses the issue as whether federal or state law shall "govern" the interpretation of section 2(2). Obviously the matter is the proper interpretation of federal law. The court below concluded that the characterization of gas utility districts as "municipalities" by the Tennessee legislature and as "arms or instrumentalities" of the state by the Supreme Court of Tennessee ought to be controlling. The Board disagrees, contending that "although a state has a vital interest in defining its political subdivisions and a special competence to do so" (Br. 13), this Court's decision in *NLRB* v. *Hearst Publications*, 322 U.S. 111 (1944), mandates the development of an independent federal definition by the Board which need not defer to state court characterizations.

The weight attributed to *Hearst* as a basis for ignoring the Tennessee Supreme Court's characterization is too far reaching. Simply because the National Labor Relations Act established a national labor policy does not, ipso facto, compel the conclusion that Congress intended state law to be superseded concerning the peculiarly local question of what constitutes a political subdivision. This Court was faced with a similar contention by the United States with respect to the rule to be followed in interpreting "real property"

under the Reconstruction Finance Corporation Act in *RFC* v. *Beaver County,* 328 U.S. 204 (1946), decided after the *Hearst* case, and dealt with that argument as follows (*Id.* at 209-10):

> "In support of its contention that a federal definition of real property should be applied, the government relies on the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired. . . . But Congress in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each state and locality. For the several states, and even the localities within them, have diverse methods of assessment, collection, and refunding. Tax rates vary widely. To all of these variable tax consequences Congress has expressly subjected the "real property" of the Defense Plant Corporation. In view of this express provision the normal assumption that Congress intends its law to have the same consequences throughout the nation cannot be made.
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> * * *
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> We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act."

The foregoing rationale is equally applicable to the definition of "political subdivisions" in the National Labor Relations Act. Nothing in the Act or this Court's decision in *Hearst* compels the conclusion reached by the Board. The characterization by a state's highest court as to the nature of one of its public bodies is a matter of peculiar state concern, wholly

unlike the complex questions of employer-employee relationships involved in *Hearst*. While the Board's expertise and the need for a uniform national labor policy would justify a conclusion contrary to state law concerning the kind of employment relationships covered by the Act, the situation here is wholly dissimilar. Respondent is admittedly an employer. Whether it is also a political subdivision does not turn on matters peculiarly within the Board's competence, nor should it.[8] Moreover, the *Hearst* decision did not foreclose the application of state law as a matter of federal law in interpreting other provisions of the National Labor Relations Act. Where, as here, Congress has not expressed itself definitively on a matter treated in the Act, "there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy." *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).[9]

The court below properly applied the *Hearst County* and *Hoosier Cardinal* tests. There was no allegation by the Board, nor could there be, that the Tennessee Supreme Court's characterization was either discriminatory, unreasonable, or patently counter to the policy

[8] For the same reasons the Board's assertion that the court below "should have accepted the Board's considered judgment on this matter" (Br. 9) is without merit. NLRB v. Brown, 380 U.S. 278 (1965).

[9] The cases cited by the Board relating to the anti-strike provisions of state law and their applicability to certain categories of workers (Br. 10, 12-13) lend no support to its contentions. Those cases, like *Hearst*, went to the nature of the employment relationship between a government entity (concededly within the exemption) and certain workers, not to the question of whether a particular entity was in fact a "political subdivision" of a state, a patently different issue.

of the Act. The fact that the state court's decision was rendered in a context unrelated to labor problems does not derogate from its validity, as the Board suggests.[6] Rather it provided an objective setting assuring that it was not handed down with any design to frustrate or circumvent the purposes of the National Labor Relations Act. The conclusion of the court below that the Tennessee Supreme Court's characterization was "binding" on the Board must be read in that context.

II. The interpretation of section 2(2) applied by the court below accords with the Board's administrative construction of the Act for over 25 years.

With the single exception of the distinguishable line of cases relating to cooperatives,[7] the Board, until its decision in *Hawkins*, had employed the following procedure in ascertaining whether the entity involved was a political subdivision and thereby entitled to receive an exemption:

(a) If a state court characterized the subject entity as not being a political subdivision,' or as being properly considered a political subdivision,[8] or as possessing the characteristics which are usually associated

[6] Indeed, a state court is unlikely to ever have the precise question at issue here presented to it, since it can only arise in the context of an NLRB proceeding. Nor can the Board's suggestion (Br. 14, n.8.9) that a state can or would apply such characterizations arbitrarily be supported.

[7] *See* pp. 8-10, *infra*.

[8] Truckee-Carson Irrigation District, 164 N.L.R.B. 1176 (1967).

[8] New Bedford, Woods Hole, Martha's Vineyard, 127 N.L.R.B. 1322, 1324-25 (1960). Southeastern Alabama Gas District, Andalusia, Alabama, N.L.R.B. Case No. 15-RC-3493 (1966); Marshall County Gas District, N.L.R.B. Case No. 10-RC-7832 (1969).

with political subdivisions,[9] the court's decision was given controlling weight;

(b) in the absence of a definitive state court decision on the subject, the Board undertook a de novo determination[10] of whether the subject entity possessed the characteristics of a political subdivision, giving careful consideration, although not binding effect, to the following sources of information, where available:

(i) the pronouncements of lower echelon legal or administrative officers, e.g., the State's attorney general, or the State's labor board;[11]

(ii) statutory characterization.[12]

This consistent practice was departed from in *Randolph Electric Membership Corporation*, 145 N.L.R.B. 158 (1963), where the Board, after having consistently asserted jurisdiction over various kinds of private co-

[9] International Brotherhood of Electrical Workers, 87 NLRB 99, 100 (1949). Kentucky courts did not characterize boards of education as "political subdivisions" but rather they held that they exercised a state function, were composed of state officers, and held state property. The Board recognized that courts in other states had declared entities possessing these characteristics as being political subdivisions and held that the entity involved should also be so characterized.

[10] Virginia Pilot Ass'n, 159 N.L.R.B. 1733 (1966); Local Joint Executive Board, 153 N.L.R.B. 392, 396-97 (1965); Middle Dept. Ass'n of Fire Underwriters, 122 N.L.R.B. 1115 (1959); Woods Hole, *supra* note 8 at 1324-1326; Oxnard Harbor District, 34 N.L.R.B. 1285, 1289-90 (1941).

[11] Woods Hole, *supra* note 8 at 1325-26 (labor board decisions); Randolph Electric Membership Corp., 145 N.L.R.B. 158 (1963) (attorney general's decision).

[12] Randolph Electric Membership Corp., *supra* note 11; Woods Hole, *supra* note 8 at 1326; Mobile Steamship Ass'n, 8 N.L.R.B. 1297 (1938).

operatives since 1947, was faced with a situation in which the North Carolina legislature and the state's attorney general had characterized electric membership corporations as "public agencies" having, within certain limits, "the same rights as any other political subdivision of the State." 145 N.L.R.B. 158, 161 (1963). There was no decision on the matter by any North Carolina court. In that case, applying a test which departed from its previous criteria, the Board concluded that the characterizations by the state's legislature and attorney general were not conclusive of the question. Its order was affirmed by the Fourth Circuit. *NLRB* v. *Randolph Electric Membership Corp.*, 343 F.2d 60 (1965).

The decisions of the Board and the Fourth Circuit in *Randolph* are consistent with the rationale of the court below in that it seems clear that Congress did not intend to include private electric cooperatives as "political subdivisions" of a state. Congress has traditionally recognized the distinction between private cooperatives and public governmental agencies. This is most evident in the many statutes providing for preference to public agencies and cooperatives in the sale of power from federal installations.[13] Similarly, in 1935 the electric cooperative movement was just underway and it appears unlikely that Congress in developing the

[13] E.g., preference in the sale of federal power is given to "public bodies and cooperatives" by the Bonneville Power Act of 1937 (16 U.S.C. § 832c), the Fork Peck Project Act of 1938 (16 U.S.C. § 833c), and the Flood Control Act of 1944 (16 U.S.C. § 825s); to "municipalities and other public corporations or agencies; and also to cooperatives and other non-profit organizations" by the Reclamation Project Act of 1939 (43 U.S.C. § 485h) and the Water Conservation and Utilization Act of 1939 (16 U.S.C. § 590z-7).

National Labor Relations Act considered these budding private, non-profit institutions as "political subdivisions of a state." Indeed, for these same reasons it has been held that electric cooperatives are not within the exemption from Federal Power Commission jurisdiction provided governmental instrumentalities in the Public Utility Holding Company Act, enacted in the same Congress as the National Labor Relations Act. *City of Paris* v. *FPC*, 394 F.2d 983 (D.C. Cir. 1968). This being so, the *Randolph* decision may be sustained either as clearly consistent with Congressional intent or as setting aside an "unreasonable" state characterization in light of the general treatment of electric cooperatives as private entities by most states and Congress.

III. The Board's "independent test" as to whether respondent is a "political subdivision" departs from the criteria previously applied by the Board and inaugurates a functional test long discarded as a valid test of "governmental" activity.

The Board's decision in *Hawkins County* is in error not only in disregarding its established administrative practice which properly accorded controlling weight to state court decisions, but also in error in that it disregards those common elements of the cases in which it made a de novo determination of the question of whether an entity was in fact a political subdivision which it considered determinative of the question. For example, in *Oxnard Harbor District* (34 N.L.R.B. 1285 (1941)):

(a) the district is formed by petition of 50 or more voters in the area proposed for the district;

(b) those voters by election select three persons to serve as harbor commissioners;

(c) the County Board of Supervisors (an arm of the State) pases on the feasibility of the district, the legitimacy of the election and if the decision is favorable grants the petition thus creating the district. This district was held by the Board to possess the characteristics which it consistently applies as indicative of a political subdivision, namely that the entity must have been created directly by the State, or be administered by State appointed or publicly elected individuals.[14]

In *Hawkins County:*

(a) the district is formed by petition of property owners (analogous to voters);

(b) the county judge, a publicly elected official and arm of the state, determines whether the district is feasible;

(c) the commissioners of the district are either appointed by a publicly elected official (the same county judge) or are elected by the qualified voters of the district (R. 86,125) and the same public official fills vacancies if the commissioners cannot agree on a replacement.

Applying the criteria stated by the Board the distinctions between *Oxnard* and *Hawkins* are more apparent than real and the error of the Board in the *Hawkins* decision becomes obvious.

Clearly erroneous, moreover, is the Board's reliance on the gas utility function performed by the respondent as a primary reason for concluding that it is not

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[14] E.g., Virginia Pilot Ass'n, 159 N.L.R.B. 1733 (1966); Local Joint Executive Board, 153 N.L.R.B. 392, 397 (1965); Randolph Electric Membership Corp., 145 N.L.R.B. 158 (1963).

a political subdivision (Pet. for Cert., App. C, pp. 37-38):

> "Furthermore, its operations and services do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act."

This test resurrects the long abandoned distinction between "governmental" and "proprietary" functions as a test for the appropriateness of governmental immunity. This distinction was laid to rest in the intergovernmental tax immunity field by this Court in *New York* v. *United States,* 326 U.S. 572 (1946), where it was rejected by all three opinions in that case. The rationale for its rejection was most pointedly stated by Justices Douglas and Black (*Id.* at 591):

> ". . . A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. *Cf. Helvering* v. *Gerhardt,* 304 U.S. 405, 426, 427. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system, as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an early day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina* v. *United States,* any activity in which a state engages within the limits of its police power is a legitimate governmental activity. Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty."

There are over 900 publicly owned gas utilities and 2,000 publicly owned electric utilities[15] in the nation. The implications of the Board's contention pose a serious threat to the exemption it was assumed Congress had provided for them in section 2(2). If state law is to be ignored in determining whether they are "political subdivisions" and replaced by the Board's "independent test" keyed to whether the entity in question is performing a function traditionally in the realm of private enterprise, the Congressional exemption will have been rendered meaningless to thousands of governmental utilities.

IV. The Board's decision jeopardizes the status of political subdivisions under numerous federal statutes granting preferential treatment or regulatory exemptions to such subdivisions.

If this Court sanctions the Board's disregard of the determination of a state court that a certain entity is a political subdivision a reverse domino effect could result. Other government agencies which had hitherto accepted state court characterizations and granted statutory preferences or exemption based upon such characterizations would feel free to disregard that characterization thereby jeopardizing long established and relied on preferences and exemptions. Some of the preferences conceivably affected are:

A. Preferences to political subdivisions in the development of and benefits flowing from the nation's water power resources.

Congress has over a period of many years recognized that the furnishing of electric power to its citizens is a legitimate activity of states and their political sub-

[15] 1969 Directory, American Public Gas Association; Annual Directory, 1971, American Public Power Association.

divisions and that it is directly related to public health, safety and welfare. Indeed, it has fostered and encouraged states and other public bodies to engage in the distribution of electric power to citizens by provisions in the law granting preferences to them in the purchase of electric power generated at Federal projects [16] and in the non-federal development of hydro power resources.[17]

B. Exemptions from coverage by the federal income tax laws.

Federal taxation of utility districts analogous to Hawkins County would work a severe disruption of established state and municipal fiscal systems. The respondent Hawkins County Public Utility District,

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[16] (1) Boulder Canyon Project Act, § 5, 43 U.S.C. § 617d(c) (in case of conflicting applications re contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or sale of energy, preferences granted to State or political subdivision).

(2) Tennessee Valley Authority Act, 16 U.S.C. §§ 831i, j (preference in sale and distribution of surplus power to States, counties, municipalities is construed to include "public agencies" of any of them).

(3) Rural Electrification Act, 7 U.S.C. § 904 (preferences in federal loans for electric plants and transmission lines to "subdivisions and agencies" of States).

(4) Bonneville Project Act, 16 U.S.C. §§ 832b, c (preferences in the distribution of electricity to "public bodies" including agencies or subdivisions of States, counties and municipalities). Same coverage: Fort Peck Project Act, 16 U.S.C. § 833c. § 833c.

(5) Reclamation Project Act of 1939, 43 U.S.C. § 485 (preference in the sale of electric power or lease of power privileges shall be given "to municipalities and other public corporations or agencies.") Same coverage: Water Conservation and Utilization Act, 16 U.S.C. § 590z-7.

[17] Federal Power Act, § 7, 16 U.S.C. § 800 (preference in applications re hydro projects to States and municipalities,—municipality is defined as including political subdivisions).

similar to other public systems, has issued tax exempt bonds for its facilities and is exempt from Federal income tax.[18] The overwhelming majority of public gas systems are organized to serve, are owned or are controlled by small communities and utility districts. This phenomenon of concentration of public power in small communities and districts where often the private power companies would not venture for lack of a sizeable market, indicates that care should be taken not to endorse any agency action that would endanger either these systems' power source or the revenues therefrom. The long-established national policies expressed in the Internal Revenue Code and uniformly applied to exempt Hawkins County and other public gas districts in the past are necessary to the continued operation of such systems to serve their communities.

C. Exemptions from federal regulatory and social welfare programs.

If the Board's rationale is sustained, substantially similar exemptions for political subdivisions under a host of other federal statutes (*see, e.g.*, note 2, *supra*) will become fair game for all other federal agencies. Although the Board seeks to disclaim any intent to have its views affect similar exemptions under other federal laws (Br. 15, n. 10), the adverse impact in those other areas is inevitable. Long-established relationships between the Federal Government and local subdivisions under many Federal statutes could be sub-

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[18] (1) Internal Revenue Code, 26 U.S.C. § 103(a) (gross income does not include interest on—(1) the obligations of a State . . . or any political subdivision of . . . the foregoing . . .).

(2) Internal Revenue Code, 26 U.S.C. § 115 (gross income does not include—(1) income derived from any public utility or the exercise of any essential governmental function and accruing to a State or Territory, or any political subdivision thereof . . .").

ject to question or litigation creating an era of doubt and uncertainty that could hinder the conduct of vital public activities at the local level.

CONCLUSION

For each and all of the reasons stated above, the American Public Gas Association, as Amicus Curiae on behalf of the local public gas distribution systems it represents, respectfully requests that the Supreme Court of the United States grant the relief requested by the Respondents in this proceedings, and affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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